Supreme Court, U.S.
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No. 90-5844

In The

Supreme Court of the United States

October Term, 1991

TERRY FOUCHA,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ Of Certiorari To The Louisiana Supreme Court

BRIEF OF RESPONDENT

HARRY F. CONNICK*
District Attorney for
the Parish of Orleans

PAMELA S. MORAN
Assistant District Attorney
619 S. White Street
New Orleans, Louisiana 70119
Telephone: (504) 822-2414

Counsel for the State of Louisiana, Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

Whether the Louisiana statutory scheme which allows the state to confine an insanity acquittee who is no longer mentally ill for an indefinite period of time, solely on the ground that the individual is dangerous to himself or others, violates the due process and/or equal protection clauses of the Fourteenth Amendment to the United States Constitution.

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OPINION BELOW

The opinion of the Louisiana Supreme Court was rendered on June 14, 1990 and appears at 563 So.2d 1138 (La. 1990). This opinion appears in the Joint Appendix at page 28.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitution of the United States, Amendment XIV, Section 1: " . . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Louisiana Code of Criminal Procedure Articles 654 et seq., in particular article 657: " . . . the court may either continue the commitment or hold a contradictory hearing to determine whether the committed person can be discharged, or can be released on probation, without danger to others or to himself."

STATEMENT OF THE CASE

Petitioner, Terry Foucha, was charged by bill of information with aggravated burglary, a violation of La. R.S. 14:60 (Rec. at 1). The state alleged that he entered the home of Mr. and Mrs. Andrew Green while armed with a .357 revolver and chased them out of their home. The Greens called the police and Foucha, 17 years of age at the time, who was caught leaving the scene, fired the

revolver at the arresting officers who chased and apprehended him. The petitioner pleaded not guilty by reason of insanity and on October 11, 1984 Foucha was found not guilty by reason of insanity by the Honorable Shirley Wimberly. (Rec. at 38). Foucha was ordered committed to the East Feliciana Forensic Facility for care, custody and treatment.

Terry Foucha sought release and on March 21, 1988, a review panel at Feliciana recommended that he be released on probation. (Rec. at 87).

On November 29, 1988 a lunacy hearing was held to determine whether Foucha should be released from Feliciana. Dr. Ritter, one of the psychiatrists who had examined Foucha when he was first committed, described Foucha as being in remission. When asked whether the psychosis could reassert itself should the petitioner be released, Dr. Ritter replied that it "Certainly could." (J.A. 18).

Dr. Ritter described the petitioner as being paranoid, arrogant and threatening and would not certify that petitioner would not be a danger to himself or others if released. The trial court ruled that Foucha was still dangerous and ordered that he remain at Feliciana. The petitioner then applied for writs to the Louisiana Court of Appeal for the Fourth Circuit, which denied his writ application. The petitioner subsequently sought review in the Louisiana Supreme Court, which on June 14, 1990 affirmed the decision of the trial court remanding petitioner to Feliciana.

The petition of Terry Foucha to this Honorable Court for Writ of Certiorari was granted on April 1, 1991.

SUMMARY OF ARGUMENT

The Louisiana statutory scheme which mandates that an insanity acquittee be maintained in a psychiatric facility based solely on the danger that the acquittee poses to himself and to the community is not violative of the Fourteenth Amendment to the United States Constitution. The state of Louisiana has a legitimate and compelling interest in protecting its citizens from those individuals who pose a continuing danger to society and to themselves. The Louisiana statutory scheme for the release of insanity acquittees provides sufficient procedural safeguards to insure an acquittee's right to due process.

Additionally, the Louisiana release procedures for insanity acquittees comports with the equal protection clause of the Fourteenth Amendment as it has previously been held that insanity acquittees maybe treated differently then civil committees and that the two groups need not be subject to the same procedural safeguards.

ARGUMENT

I. Louisiana's Statutory Scheme for the Release of Insanity Acquittees from State Mental Health Facilities Comports with the Due Process Requirements of the United States Constitution

Under the provisions of Louisiana Code of Criminal Procedure articles 654 et seq., one who has been found not guilty by reason of insanity must remain in a mental health facility until the insanity acquittee can prove to the

satisfaction of a court that he may be returned to society "without danger to others or himself" regardless of whether the individual remains mentally ill.

While constitutional due process mandates that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ", in certain instances, the needs of society as a whole outweigh the liberty interest of the individual. Such is the case here, as it was in *U.S. v. Salerno*, 481 U.S. 739 (1987). In *Salerno*, this Court was called upon to examine the Bail Reform Act of 1984, which mandates that arrestees charged with certain serious felonies be held prior to trial based on the danger that the arrestee poses to the community.

In *Salerno*, the defendant complained that detaining him prior to his being convicted of a crime denied him due process of the law. However, this Court determined that Salerno had not been denied due process by his pretrial detention. This Court ruled that Salerno's pretrial detention was not penal, but regulatory in nature and indicated that "[t]here is no doubt that preventing danger to the community is a legitimate regulatory goal." (U.S. at 747) Although *Salerno* dealt with pretrial detainment, the same reasoning which was applied in that case should be applied in the instant case, as the two situations are similar in many respects. Both cases involve the detainment of an individual who has been accused, but not convicted of having committed a crime. As such, both men have an interest in remaining free. It can even be said that Salerno had an even greater liberty interest in that he was detained prior to trial on the merits and an ensuing determination of guilt. In the petitioner's case, he was afforded a trial and although he was found not

guilty by reason of insanity, such an adjudication means that he did in fact commit the act which formed the basis of his criminal charge.

This Court has "repeatedly held that the Government's regulatory interest in community safety can in appropriate circumstances, outweigh an individual's liberty interest." (*Salerno*, U.S. at 748). Louisiana's compelling and legitimate interest in protecting its citizens from the threat posed by the release of insanity acquittees who have been judicially determined to be dangerous presents an appropriate circumstance where community safety outweighs the liberty interest of the individual.

As in *Salerno*, the purpose of detaining insanity acquittees in mental health facilities is not punitive and cannot be as the individual has not been convicted of having committed a crime. Detaining an individual under the facts of *Salerno* and the instant case serves the regulatory purpose of preserving the safety of the community, a purpose which has on previous occasions been held to be constitutionally legitimate. In *Addington v. Texas*, 441 U.S. 418, 427 (1987), this Court held that "the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill."[1]

Although a determination was made that Foucha was not mentally ill, he was determined to be dangerous

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[1] The Court in *Addington* noted that "Under the Texas Mental Health Code, however, the State has no interest in confining individuals involuntarily if they are not mentally ill *or* if they do not pose some danger to themselves or others. U.S. at 427. (emphasis added)

following a contradictory hearing. This finding of dangerousness alone is sufficient to detain an insanity acquittee in a mental health facility provided certain procedural safeguards are in place, as they were in *Salerno*.

In *Salerno*, the detainee was entitled to a detention hearing at which time he had a right to be represented by counsel, to testify on his own behalf, to present his own witnesses and evidence and to cross-examine witnesses. Following the hearing, the court was required to issue written reasons for its determination and the detainee was entitled to immediate appellate review. Under the Louisiana statutory scheme, an individual who has been found not guilty by reason of insanity is remanded to a mental health facility or parish prison and a contradictory hearing is held promptly to determine if the acquittee may be released without danger to himself or others. Here also, as in *Salerno*, the detainee is entitled to be represented by counsel, to present witnesses and to cross-examine witnesses. Again, the court must prepare written reasons for the individual's commitment. Following a six month period, the committee may apply for release at which time another contradictory hearing will be held. If the court determines that continued commitment is necessary, the committee must wait one year before reapplying for release. At any time, however, the director of the mental health facility may recommend to the court, that the committee be released at which time the court may hold a contradictory hearing to determine whether the committee may be released without a danger to himself or others. Following this Court's reasoning in *Salerno*, Louisiana's statutory scheme for the release of insanity acquittees does no violence to the petitioner's right to

due process as the State has a legitimate and compelling purpose in protecting its citizens from the harm posed by dangerous individuals such as the petitioner. Additionally, the procedural safeguards inherent in the Louisiana statutory scheme provide adequate protection against the wrongful commitment of individuals.

The Court's decision in *Salerno* is especially instructive when read in conjunction with it's earlier decision in *Jones v. United States*, 463 U.S. 354 (1983) wherein this Court held that "a finding of not guilty by reason of insanity is a sufficient foundation for commitment of an insanity acquittee for the purposes of treatment *and the protection of society.*" U.S. at 367 (emphasis added). The Court goes on to recognize that "the purpose of commitment following an insanity acquittal, like that of civil commitment is to treat the individual's mental illness *and protect him and society from his potential dangerousness*. The committed acquittee is entitled to release when he has recovered his sanity *or is no longer dangerous.*" *Jones* at 369 (emphasis added).

The Louisiana Supreme Court in *State v. Foucha*, 563 So.2d 1138 (La. 1990) examined several federal appeals decisions before holding that the Louisiana statutory scheme for the release of insanity acquittees does not deny due process to an insanity acquittee who remains incarcerated as long as he is considered dangerous. The Court relied in part on *Hickey v. Morris*, 722 F.2d 543 (9th Cir. 1983) which upheld a Washington law permitting insanity acquittees to be released only if the release would pose no substantial danger to other persons or no substantial likelihood that the released individual would commit felonious acts which would jeopardize public

safety. In *Hickey* a class of insanity acquittees alleged in a habeas corpus proceeding that Washington's procedures for the confinement and release of insanity acquittees were unconstitutional. The Ninth Circuit in *Hickey* held that the Washington law did not violate equal protection by providing different commitment procedures for civil committees and insanity acquittees. The court further held that the existence of different procedures for review and release of civil and criminal committees does not deny insanity acquittees equal protection of the law or violate due process.

The court in *Foucha* also examined the analysis in *Harris v. Ballone*, 681 F.2d 225 (4th Cir. 1982) which concerns a Virginia statute which permits an insanity acquittee to be released only if the acquittee is not insane and provided his release would not be dangerous to the public peace and safety or to the acquittee himself. The court in *Harris* stated:

> " . . . We hold that it is not a denial of due process for a person who has committed a criminal act to be incarcerated as long as he is considered dangerous. Nor do we think that this aspect of Virginia's scheme denies equal protection because a different standard (i.e., insane and dangerous) is used for persons other than insanity acquittees. Again, we think that the fact that an insanity acquittee has already been shown beyond a reasonable doubt to have committed at least one dangerous act justifies the distinction Virginia has drawn." (citations omitted) at 228.

Additionally, the court in *Foucha* cited *State v. Mahone*, 379 N.W.2d 878 (Wis. App. 1985) which upheld a Wisconsin law that permitted insanity acquittees to be released only if there would be no danger to the acquittee or others.

Although the Fifth Circuit criticized Louisiana's release procedures for insanity acquittees in *Francois v. Henderson*, 850 F.2d 231 (5th Cir. 1988), that ruling was not a decision regarding the validity of the amended statutes, but was rather a factual decision. *Francois* presented a record from which the court found that the state trial judge had ruled contrary to the evidence before him (at 234). Thus, *Francois* did not invalidate state law, but rather attacked the state court's findings and held that Francois, under the facts of his case, had not been afforded adequate constitutional protection under state law.

As previously shown however, certain federal circuits have sanctioned statutes similar to Louisiana's which allow continued confinement of insanity acquittees based on dangerousness alone. Especially in light of this Court's decisions in *Salerno* and *Jones*, the Louisiana statutory scheme for the release of insanity acquittees should be upheld as it provides adequate protection of the acquittee's right to due process.

II. The Disparate Treatment of Civil Committees and Criminal Committees in Release Applications Does Not Violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

In order to address the equal protection issue, this Court must ascertain the nature of the distinction created by the Louisiana legislature and the reasons for it.

The Louisiana Supreme Court in *State v. Foucha*, 563 So.2d 1138 (La. 1990) addressed the issue of whether insanity acquittees and civil committees may be treated differently when it comes to release procedures. The differences between civil committees and insanity acquittees has been previously recognized by the federal judiciary. This court in *Jones v. United States*, 463 U.S. 354 (1983) stated:

> "We hold that when a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society. This holding accords with the widely and *reasonably* held view that insanity acquittees constitute a special class that should be treated differently from other candidates for commitment." U.S. at 370 (emphasis added).

The petitioner in *Jones* complained that proof of his insanity was established only by a preponderance of the evidence, whereas civil commitment required proof by clear and convincing evidence. This Court pointed out that there are "important differences between the class of potential civil commitment candidates and the class of insanity acquittees that justify differing standards of proof." (U.S. at 367). In *Williams v. Wallis*, 734 F.2d 1434 (11th Cir. 1984), an Alabama man, charged with murder was found not guilty by reason of insanity. He challenged the Alabama statutory scheme claiming violations of due process and equal protection. Williams claimed that insanity acquittees were treated differently than civil

committees. Although the court found that Williams' claim was unsupported by the record, the court noted that "[b]inding precedent in this circuit holds, however, that differences in release procedures based on dangerousness are constitutionally permissible." (at 1437). The court in *Williams* recognized that the state has a substantial interest in preventing "the premature release of individuals who have already proven their dangerousness to society by committing a criminal act . . . " (at 1439). The court in *Williams* determined that there were sufficient procedures in place to safeguard an insanity acquittee's right to due process and noted that an insanity acquittee has the additional protection of being able to apply for habeas corpus relief.

The court in *Phelps v. U.S.*, 831 F.2d 897 (9th Cir. 1987) cited *Salerno* and noted that the dangerousness test "is not an unfamiliar one" but has been "applied regularly by judges in a variety of contexts." (*Phelps* at 898). *See also U.S. v. Sahhar*, 917 F.2d 1197 (9th Cir. 1990).

Petitioner complains that the trial court failed to "implement the deinstitutionalization program as recommended by a three-member panel of psychiatrists from the Feliciana Forensic Facility". (Petitioner's Brief p. 1) While a court may utilize medical opinion in rendering a decision, it is not obligated to do so. The court in *Benham v. Ledbetter*, 785 F.2d 1480 (11th Cir. 1986), following a thorough analysis of *Jones v. United States*, noted that the *Jones* Court rejected "the suggestion that Congress's power to legislate in this area depends on the research conducted by the psychiatric community." (at 1486 citing *Jones*, U.S. at 364-65 n.13). The court in *Benham* went on to

recognize the importance of the role played by the judiciary in examining the wisdom of releasing or recommitting an insanity acquittee where it stated that "[t]he state has an interest in invoking the judiciary's expertise in criminal matters." (at 1487). The *Benham* court further recognized that:

> "A legislature might conclude that public confidence in the integrity of the insanity defense would be undermined if the legislature delegated release decisions to medical professionals." (at 1487).

It must not be forgotten that although petitioner was not convicted of a criminal offense, the origin of the matter presently before this Court is criminal. As such, this case raises certain issues that don't arise in instances of civil commitment.

One such consideration is the desire of a state legislature to discourage false pleas of insanity. This purpose was recognized in *Benham,* (at 1487 citing *Lynch v. Overhoser,* 369 U.S. 705) which also relied on *Warren v. Harvey,* 632 F.2d 925 (2nd Cir. 1980).

Although insanity acquittees are not subject to the same release procedures as are civil committees, the disparity in treatment serves a legitimate and compelling state purpose. As outlined above, Louisiana's procedures for the release of insanity acquittees does not violate the insanity acquittee's right to equal protection of the law.

CONCLUSION

Louisiana's statutory scheme for the release of insanity acquittees which provides that an insanity acquittee

remain in custody until it is shown that he no longer poses a danger to himself or to others violates neither the due process clause or the equal protection clause of the Fourteenth Amendment to the United States Constitution. The state of Louisiana has a legitimate and compelling interest in protecting the community from those individuals who are a continuing threat to society and to themselves. The Louisiana statutory scheme for the release of insanity acquittees provides sufficient procedural safeguards to insure an acquittee's right to due process.

Additionally, the Louisiana release procedures for insanity acquittees comports with the equal protection clause of the Fourteenth Amendment as it has previously been held that insanity acquittees may be treated differently than civil committees and that the two groups need not be subject to the same procedural safeguards.

As such, respondent respectfully requests that this Honorable Court affirm the decision of the Louisiana Supreme Court.

Respectfully submitted,

HARRY F. CONNICK*
District Attorney for
the Parish of Orleans

PAMELA S. MORAN
Assistant District Attorney
619 S. White Street
New Orleans, Louisiana 70119
Telephone: (504) 822-2414

Counsel for The State of Louisiana, Respondent

*Counsel of Record